UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

In re Holocaust Victim Assets Litigation	Master Docket No. CV 96-4849 (ERK)(MDG)
This Document Relates to All Actions	Consolidated with CV-96 5161 and CV-97-461

Final Supplemental Memorandum of Law
In Support of Fee Application of
Burt Neuborne

The record is now complete on the fee application of Lead Settlement Counsel Burt Neuborne for an award of attorney's fees. Objections have been filed by Mr. Swift on his own behalf and by Mr. Dubbin on behalf of a handful of class members. This matter is now ripe for resolution and, accordingly, Mr. Neuborne respectfully requests that this matter be set for a hearing at the Court's earliest convenience.

In light of Mr. Dubbin's Objection of Feb. 17, 2006, it is worth noting the critical issues that this Court should address in adjudicating the requested fee award.

Mr. Neuborne's Hourly Rate: The record is undisputed that the appropriate hourly rate for a lawyer of Mr. Neuborne's experience in the relevant New York market is at least $700 per hour. That request is amply supported by leading New York practitioners and is uncontested. The Second Circuit has made clear that it is reversible error to reject competent evidence on market rates in favor of unsupported claims for lower rates. *See Farbotko v. Clinton County*, 433 F.3d 204, 208 (2d Cir. 2005). The only challenge to the hourly rate is based on Mr. Swift's assertion that Mr. Neuborne should be paid based on his "cost structure" rather than market rates. Not only has the Second Circuit expressly rejected non-market approaches to hourly rates in fee awards, most recently in *Farbotko,* but this exact argument was unceremoniously and directly rejected by the U.S. Supreme Court in *Blum v. Stenson,* 465 U.S. 557, 562 (1984).

Mr. Neuborne's Time: Mr. Neuborne has submitted contemporaneous time records of more than 8,000 hours expended on this matter since his appointment as Lead Settlement Counsel. Before submission to this Court, these hours were cross-indexed against the work actually performed. Moreover, the work done was highly transparent as Mr. Neuborne made frequent appearances before this Court and the Second Circuit in defense of the proposed distribution of funds to the class, and was in regular contact with this Court and the Special Master on innumerable questions of the administration of the proceeds of this historic settlement. Previously, Mr. Swift identified 122.5 hours that he wished to challenge. Mr. Dubbin now adds 71.5 hours that he wishes to challenge. The grand total of hours challenged is 194, or less than 2.5 % of the hours worked. Even if these objections were accepted in their entirety, they would easily be subsumed in the 25% discount that Mr. Neuborne voluntarily seeks in this case. Moreover, the 25% discount is *more* than the amount that has been discounted by the Second Circuit in cases in which there are no contemporaneous fee records at all. *See, e.g., Terminate Control Corp. v. Horowitz,* 28 F. 3d 1335 (2d Cir. 1994) (reducing base lodestar by 15 percent because of failure to maintain contemporaneous time records).

Despite the lack of any serious challenge, the claims put forward by Mr. Dubbin cannot be left unanswered. Appended to this Memorandum is the Second Supplemental Declaration of Mr. Neuborne refuting line by line the oftentimes scurrilous assertions of

Mr. Dubbin. Some of the objections are silly, some misinformed and some so clearly factually unmoored as to raise questions of willful impropriety. The core of the objections are to raise collaterally the claimed heroic efforts of Mr. Dubbin in this litigation, something already found by this Court and the Second Circuit to be useless to the class and extortionate in its motivation. *See In re Holocaust Victim Assets Litigation*, 424 F.3d 150,154 (2d Cir 2005) (affirming this Court, which found Mr. Dubbin guilty of efforts at extortion and blackmail and denied all requested fees).

Notice to the Class: Both Mr. Swift and Mr. Dubbin demand additional notice to the class concerning the specifics of Mr. Neuborne's fee petition. As we have previously noted in correspondence to the Court, the class has been on notice of the fact that there would be fee requests and of the amount that the fees could reach since the original class notice:

> The court appointed attorneys as Settlement Class Counsel, and appointed Settlement Class Representatives, including Holocaust survivors, the World Jewish Restitution Organization ("WRJO"), and the World Council of Orthodox Jewish Communities. You do not have to personally pay the Court appointed attorneys. Certain attorneys will apply to the Court for reimbursement of their costs, up to about .2% of the Fund. Certain Plaintiffs' attorneys will also apply for fees, up to at most 1.8% of the Fund. The Court may award a lower amount. Most attorneys will not apply for fees, and counsel for the WJRO will not apply for fees or costs.

The proposed fee request would not alter the expectations of the class one iota.

As we further previously noted to this Court, there is a substantial body of case law disapproving of claims of the need to renotice a class because of administrative changes. The costs and burdens associated with such claims would threaten to disrupt all class actions. As Judge Schindlin recently held concerning renoticing an entire class, "Courts have generally disfavored republication of notice when a complaint is amended, even where the amendment alters the class period." *Teamsters Local 445 v. Bombardier*

Inc., 2005 WL 1322721 (S.D.N.Y. 2005). *See also Greenberg v. Bear Stearns,* 80 F.Supp.2d 65, 67 (E.D.N.Y. 2000)("As the lead class plaintiffs in the multi district litigation had previously published a notice informing potential plaintiffs of the existing litigation involving purchasers of ML Direct against the defendant Sterling Foster, the Court finds that neither case law nor the provisions of the PSLRA require a second notice to be published when the complaint was amended to add the Bear Stearns additional defendant"). Neither Mr. Swift nor Mr. Dubbin have provided a single case ordering republication of notice when counsel submit their actual fee petition in a case where the class is already on notice of the total amount of fees that may be awarded.

Instead Mr. Swift and Mr. Dubbin argue that recent amendments to Rule 23 compel renotice. They cite not a single case that has ordered renotice on this basis. Even if the Court were to find that notice of each individual fee claim were to be required as a result of rule 23(h)(1), this case more than satisfies such requirements. By its terms Rule 23(h)(1) requires that notice be "directed to class members in a reasonable manner." Mr. Neuborne's fee application is already posted on this Court's website, the most accessible and most authoritative source of information for the class. In addition, as set forth in Mr. Neuborne's declaration, articles have been written on the fee request in newspapers routinely surveyed by class members including the Forward, Haaretz and a likely publication in the New York Times. Neither Mr. Swift nor Mr. Dubbin cite to any authority that a tombstone ad in a number of newspapers would likely garner more class awareness than news articles in these critical newspapers. Moreover, even the case authority cited by Mr. Dubbin stands for the proposition that website publication notice is the best form of notice, particularly when coupled with newspaper publication. *See*

Cobell v. Norton, 2005 WL 3466712 (D.D.C.)(finding that "Throughout the course of this litigation, class counsel has surmounted this obstacle by utilizing their website as the primary vehicle to communicate with the beneficiaries. Accordingly, on November 8, 2005, the Court held that 'it is reasonable to conclude" that notification on plaintiffs' website "is adequate for purposes of Rule 23(h)(1).'").

Discovery: By agreement of counsel, all additional discovery was to be resolved by February 17, 2006, as confirmed in Mr. Swift's February 9, 2006 letter to this Court and by counsel's follow-up letter on February 10, 2006. On February 17, 2006, Mr. Dubbin made untimely requests for additional information. Anything deemed relevant was provided regardless. Mr. Dubbin has an unsupported and unsubstantiated request for a fishing expedition that goes beyond the bounds of what any court has ever permitted in a fee dispute. There are no relevant discovery issues remaining.

Estoppel: Both Mr. Swift and Mr. Dubbin argue that Mr. Neuborne should be precluded from seeking fees because he earlier refused fees in conjunction with the work done to obtain the settlement. This has already been addressed in response to Mr. Swift. Mr. Dubbin adds nothing to this issue save for his demand that Mr. Neuborne provide documentation of when this Court has recognized a distinction between the pre- and post-settlement periods. Mr. Neuborne's declaration includes a summary of the colloquy held in this Court on January 5, 2001 that addresses just this point. As confirmed by the declarations of all class counsel, no one seriously involved in this case, with the exception of Mr. Swift, had any doubts that Mr. Neuborne had to be compensated for undertaking the painstaking job of making sure that this historic settlement actually worked.

Benefit to the Class: Ultimately, the key issue in any fee award is the benefit conferred. Both this Court and the Second Circuit have noted the extraordinary achievements of Mr. Neuborne and have lauded his efforts on behalf of the class. *See, e.g., In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 149, n. 5 (2nd Cir. 2005) (explicitly rejecting Mr. Dubbin's criticisms and charactering Lead Settlement Counsel's work as "exemplary"); *In re Holocaust Victim Assets Litig.*, 424 F.3d 158, 164, n.4 (characterizing Lead Settlement Counsel's work as "important'). Principal class counsel, with the exception of Mr. Swift, have submitted declarations supporting the fee request. At the end of the day, the critical question before this Court is whether the class has been made better off for the efforts of Mr. Neuborne. That is not even a debatable question.

A hearing on the fee request should be held at the Court's earliest convenience.

Respectfully submitted,

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